IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LEWIS, J.,
individually and on behalf
of all others similarly situated,

Plaintiff,

Case No. 15-cv-082

vs.

EPIC SYSTEMS CORPORATION,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

INTRODUCTION

Epic Systems Corporation has imposed upon its employees an unjust mandate to individually arbitrate their wage claims without the benefit of their federally protected right to engage in concerted activity with fellow employees. The arbitration contract[1] explicitly forbids plaintiffs from bringing claims collectively. Each employee must bring their own cause of action alone against Epic's colossal resources. This class waiver provision cannot be enforced without offending the bedrock purpose of the National Labor Relations Act and Fair Labor Standards Act: namely, protecting employees' long-recognized right to fair wages and collective action against employers wielding superior economic power.

[1] For ease of readability, Plaintiff will refer to this document as the "arbitration contract" throughout; however, Plaintiff maintains that no enforceable contract to arbitrate has been formed.

This Court, in Herrington v. Waterstone Mortgage, has twice considered and affirmed that an agreement which forbids workers from taking collective legal action impermissibly interferes with the right of employees to act together for their mutual aid and protection. That precise question is again before the Court in this case, and this Court must, in line with its previous rulings, invalidate the no-class provision of Epic's arbitration contract.

The present arbitration contract fails under Herrington. In addition, it is important to note that the terms and circumstances related to the imposition of the arbitration contract in this case are far worse than those in Herrington. Beyond containing an impermissible bar on collective actions, the contract allows Epic to pursue its claims in court – including class claims[2] – while its employees cannot. Further, the contract deprives employees of any opportunity to reject its terms. Epic has also retained the unilateral and unlimited ability to change or eliminate the terms of the contract altogether.[3] The contract is not a product of mutual agreement or meaningful choice, but of Epic's forced "assent" from Plaintiff, who could neither seek understanding of the contract nor signal repudiation of its terms.

In addition to its impermissibly one-sided nature, the circumstances surrounding Epic's rollout of this contract are dubious at best. This contract, which

[2] Even while limiting the rights of its employees to bring claims collectively in court, Epic has preserved for itself the ability to try a class case in court. A savings clause provides that if the no-class provision of the arbitration contract is found unenforceable, a class case is *required* to proceed in court rather than in arbitration. Should this Court invalidate the no-class provision and require the class to proceed to arbitration, even Epic appears to recognize that court is preferable to arbitration.

[3] That is, the terms of this contract to arbitrate explicitly permit Epic to escape any declared promise to be bound by them. Epic has in fact promised nothing in exchange for its employees relinquishment of their legal right to have their claims heard collectively in court.

requires only that wage and hour claims be arbitrated and eliminates the right of employees to act collectively, was imposed in the midst of a collective and class wage-and-hour suit against Epic for misclassifying employees. (Nordgren v. Epic Systems Corporation, No. 13-cv-840 (W.D. Wis.).)

This case, like the Nordgren case, involves a class of Technical Writers who allege that Epic misclassified them as exempt from overtime; as such, Epic did not pay them overtime wages for all hours worked in excess of 40 per workweek. Named Plaintiff J. Lewis brought this case on behalf of himself and all others similarly situated. Epic now seeks to deprive Lewis and the putative class of their right to act collectively by asking this Court to dismiss Lewis's case and compel *individual* arbitration. In so doing, Epic ignores this Court's ruling in Herrington and tries to invoke a federal policy favoring arbitration to sanction its own transgression of Plaintiff's right, of which Epic was keenly aware when it introduced this contract, to seek unpaid overtime wages *in court*, and *as a class*. For the reasons described in detail below, Plaintiff requests that the Court deny Epic's motion to compel individual arbitration and permit this case to proceed collectively in court.

FACTUAL BACKGROUND

I. THE ARBITRATION CONTRACT

Epic emailed the arbitration contract to its employees on April 2, 2014. (Dkt. # 22.1, Ex. A ("Arbitration Contract"); Dkt. # 22.2, Ex. B ("Arbitration Email").) The text of the arbitration contract states that Epic considers an employee who continues to work at Epic subject to the contract's terms:

> Agreement to Arbitrate. Epic Systems Corporation ("Epic") and I agree to use binding arbitration, instead of going to court, for any "covered claims" that arise or have arisen between me and Epic.... I understand that if I continue to work at Epic, I will be deemed to have accepted this Agreement.

(Arbitration Contract.) The contract leaves unanswered *when* it went into effect. Although the contract is dated April 2, 2014, it does not state when its terms become applicable. (Arbitration Contract.) Importantly, although the contract states that continued employment will be deemed acceptance, it does not clarify employment after *what date*. Would an employee who continued to work at Epic after reading the arbitration email be considered to have accepted it? To avoid the terms of the arbitration contract, would an employee have to pack her desk immediately upon receiving the contract? It is not clear.

Epic's moving brief suggests that Epic considered its employees bound by clicking "I understand and agree" *and* "by continuing to remain employed after the Arbitration Agreement went into effect"—but even in its brief, Epic fails to define *when* "went into effect" occurred. (Dkt. # 20, Defendant's Brief in Support of its Motion to Dismiss and Compel Individual Arbitration ("Def. Br.") at 7.) Plaintiff sought discovery as to how many employees allegedly assented to the arbitration contract, but Epic refused to produce this information, and Plaintiff's attempt to compel this information was denied. (Dkt. # 38, Court's Order on Plaintiff's Motion to Compel.) Regardless, at least one of the individuals who has opted into this suit never clicked "I agree" to assent to the contract. (Declaration of Karen Campbell ("Campbell Dec.") at ¶ 5.)

A. The Arbitration Contract Applies Exclusively to Wage and Hour Claims

The arbitration contract defines "covered claims" as follows:

> "Covered claims" are any statutory or common law legal claims, asserted or unasserted, alleging the underpayment or overpayment of wages, expenses, loans, reimbursements, bonuses, commissions, advances, or any element of compensation, based on claims of eligibility for overtime, on-the-clock, off-the-clock or other uncompensated hours worked claims, timing or amount of pay at separation, improper deductions of pay or paid-time-off, fee disputes, travel time claims, meal or rest period claims, overpayment claims, claims of failure to reimburse or repay loans or advances, claims over improper or inaccurate pay statements, or any other claimed violation of wage-and-hour practices or procedures under local, state or federal statutory or common law.
>
> I understand and agree that arbitration is the only litigation forum for resolving covered claims, and that both Epic and I are waiving the right to a trial before a judge or jury in federal or state court in favor of arbitration.

(Arbitration Contract.) Thus, perhaps with one exception of "overpayment" claims, the contract's covered claims exclusively encompass wage and hour claims that employees would bring against Epic. To date, Epic has never brought an overpayment claim, nor any other "covered claim," against an employee. (Declaration of William E. Parsons in Support of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and Compel Arbitration ("Parsons Dec.") Ex. A, Defendant's Answers to Plaintiff's First Set of Interrogatories, Answer to Interrogatory No. 11.) The contract effectively binds only employees.

B. The Arbitration Contract Waives Employees' Right to Bring Class Claims

The arbitration contract prevents employees from bringing their wage and hour claims collectively or as part of a class:

> Waiver of Class and Collective Claims. I also agree that covered claims will be arbitrated only on an individual basis, and that both Epic and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and any arbitrator hearing my claim may not: (i) combine more than one individual's claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

(Arbitration Contract.) The waiver of class and collective claims unambiguously denies Technical Writers ("TWs") the opportunity to pursue their individual claims as if they were in court.

The contract also includes the following Savings Clause:

> Provided, however, the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

(Arbitration Contract.) In other words, if this court deems the class waiver provision unenforceable, Epic requires that *any* class or collective wage action must be filed in court, and cannot be filed in arbitration.

The arbitration contract also limits the rights that employees have in court: it precludes their right to a jury trial and severely restricts access to discovery. Parties are limited to a single interrogatory identifying potential witnesses, 25 requests for production of documents, and a maximum of two eight-hour days of witness depositions. (Arbitration Contract.) These limitations mean arbitration *is*, in fact, substantially different than court.

C. The Arbitration Contract Vests Epic with the Unilateral and Non-Negotiable Power to Modify Its Terms

The arbitration contract permits Epic to change its terms or eliminate the contract altogether. Specifically, the contract states:

> Modifications and Amendments. I understand and agree that Epic may change or terminate this agreement after giving me 90 days written or electronic notice. Any change or termination will not apply to a pending claim.

(Arbitration Contract.) The above language is ambiguous as to whether Epic will provide notice of the substantive content of the change, or merely notice of the fact that Epic is going to change or terminate the contract. Nor does the contract provide that, upon such a change, continued employment would serve as acceptance of the revised contract.

II. EPIC IMPOSED ITS ARBITRATION CONTRACT WITH A MISLEADING EMAIL AND WITHOUT ANY MECHANISM FOR EMPLOYEES TO ASSENT TO ITS TERMS OR GATHER ADDITIONAL INFORMATION

A. The Arbitration Cover Email Contains Numerous Misrepresentations

On April 2, 2014, Epic disseminated its arbitration contract via a mass email that purported to explain Epic's reasons for imposing this contract on its employees:

> For about 6 months, we have been discussing the pros and cons of arbitration vs. litigation for employment related matters. The recent class action case filed against us, claiming that some of our salaried professionals should be re-classified as hourly employees, has convinced us that litigation is inefficient and wasteful, and highlights the advantages of arbitration.

(Arbitration Email.) This passage mischaracterizes the *Nordgren* suit, in which a class of employees alleged that they had been misclassified and unlawfully deprived of overtime pay—not that they should become hourly employees. Plaintiff sought discovery as to whether Epic had in fact been contemplating arbitration prior to the filing of the *Nordgren* class action case to determine whether this representation to Epic's employees was true. Epic refused to provide any response, even the date when Epic began these alleged "discussions" of arbitration.

The cover email also included a misleading explanation of the arbitration contract – an explanation that went to a group of employees who have no legal training, and who were therefore unable to assess whether Epic's representations about arbitration were accurate.

> Arbitration will allow you to pursue your individual claims as if you were in court. The same laws apply and the arbitrator (whom you would participate in selecting) would be directed to reach a legal conclusion, and can provide the same remedies as if you were in court. Since arbitration puts some reasonable limits on processes, by addressing the merits of your claim through arbitration, rather than through individual litigation or class action, disputes can be resolved more quickly, with less expense and without the extraordinary distraction from our work that litigation often imposes.

(Arbitration Email.) Of course, the same laws *do not* apply, as collective action is explicitly prohibited under the contract. And because employees under the contract are limited in terms of their access to discovery, as well as their right to a jury trial, they are *not* able to pursue claims "as if…in court." Epic also made representations as to the costs of arbitration that neglect to provide complete information:

> Under the new process, Epic will pay for the costs of arbitration. You would pay a "filing fee" (described below) and although you don't need a lawyer for arbitration, you still may retain one at your expense.

(Arbitration Email.) Epic fails to note that under both Wisconsin state wage and hour law and the Fair Labor Standards Act ("FLSA") – the main "covered claims" under this contract – employees may be entitled to fee-shifting and to have their attorney's fees paid by the employer if they are successful. Wis. Stat. § 109.03(6); Jackman v. WMAC Inv. Corp., 610 F. Supp. 290, 291 (1985); 29 U.S.C. § 216(b).

B. Epic Did Not Provide Employees an Opportunity to Gather Information About the Arbitration Contract

The email concluded by suggesting that recipients request additional information about the contract, stating:

> Please review and acknowledge your Agreement by clicking "Vote" and then selecting "I understand and agree" or if you'd like someone to contact you about it, please select "Contact me."
>
> We will follow up with you if we have not otherwise heard from you before end of day on Friday April 4th.

(Arbitration Email.) On April 4, 2014, Epic sent a second email to all employees that simply copied and pasted the very same text of the April 2nd email, with one additional paragraph:

> Thanks to all who have previously replied. If you have, you can delete this. We are in the process of coordinating our follow up to anyone who had questions or indicated they'd like to be contacted. Please take a moment to review the materials if you haven't previously as it will assist us in knowing how best to follow-up.

(Parsons Dec. Ex. B, April 4, 2014 Email from Tina Perkins, EPIC LEWIS 42.)

According to two opt-in plaintiffs, this follow-up did not occur. Karen Campbell, a TW with Epic from 2005 until 2015, never responded to the April 2 email. (Campbell Dec. at ¶ 5.) She believed, based on Epic's email, that someone would follow up with her. (Id.) After Campbell received the same email on April 4, she again waited for someone from Epic to follow up with her, but no one did. (Id.; Epic's Emails to Opt-Ins Regarding Arbitration.) Nor was Campbell informed when the arbitration contract became binding, as she never clicked "I agree." (Id.)

Current TW Rebecca Rogers states that she was "confused" when she received the email about the arbitration contract. (Declaration of Rebecca Rogers ("Rogers Dec.") at ¶ 5.) Rogers responded to the email by clicking "I agree," but she also included several questions about the contract in the text of her email:

> Is the arbitration agreement just for wages and hours, or is it for anything that comes up between Epic and employees (e.g., on-campus injuries or something)?
>
> Is this meant just for employee-to-company disputes, or does it also encompass disputes between employees?
>
> Where do the arbitrators come from? That is, is there a group of them on retainer by Epic that we'd choose from, or do we find them by some other method?

(Id. at ¶ 6; *see also* Parsons Dec. Ex. C, April 4, 2014 Email from Rebecca Rogers, EPIC LEWIS 103.) Like Campbell, Rogers never received any response to her questions. (Rogers Dec. at ¶ 7.) In fact, Plaintiff requested that Epic produce all communications between Epic and opt-in plaintiffs pertaining to the arbitration contract and Epic's production was simply of the repetitive April 2 and April 4 emails from Epic to the opt-ins. (Parsons Dec. Ex. D, Epic's Emails to Opt-Ins

Regarding Arbitration.) No other communications between Epic and either of these opt-ins were produced, indicating that such follow up communications do not exist.

In addition, Plaintiff sought discovery from Epic as to whether it had a plan in place to follow up with TWs who sought more information, as well as whether any TWs did request further information. Epic refused to produce any information on this issue. (*See* Declaration of Breanne L. Snapp in Support of Plaintiff's Motion to Compel Discovery ("Snapp Dec.").) Plaintiff therefore does not know whether more TWs sought information about the contract, or whether Epic provided any opportunity for its employees to get more information prior to assenting to this contract. The inference is of course that Epic did not have a plan to follow up with its employees and that the arbitration contract was a take-it-or-leave-it proposition, which Epic would not explain further.

III. EPIC DISSIMENATED THE ARBITRATION CONTRACT IN THE MIDDLE OF THE *NORDGREN V. EPIC SYSTEMS* LITIGATION

On December 6, 2013, a former Epic Quality Assurance ("QA") employee, Evan Nordgren, brought a collective and class action claim against Epic for unpaid overtime wages resulting from Epic's alleged misclassification of QAs as overtime exempt. (Nordgren v. Epic Systems Corp., Case No.13-cv-840 (W.D. Wis. 2013), dkt. # 1, *Nordgren* Collective and Class Action Complaint.) On April 2, 2014, Epic disseminated the arbitration contract and cover email at issue here, a contract explicitly limited to foreclosing employees' ability to bring a class wage claim, as was brought in *Nordgren*. (Arbitration Email; Arbitration Contract.) The *Nordgren* lawsuit settled in November 2014 for $5,400,000.00. (Nordgren v. Epic Systems

Corp., dkt. # 68.1, Settlement Agreement and Release of Claims.) After the case was resolved, Epic disseminated an email to all Epic employees pertaining to the suit, again misstating the nature of the QA's claims:

> As most of you know, last year, a former QA employee who is now in law school filed a lawsuit claiming that QA staff at Epic should be paid hourly, and as a result should receive overtime pay. We have always disagreed, and continue to disagree strongly, with the claims in this case. Every day, our QAers excel at thinking creatively and making decisions that ensure our software is safe, efficient and intuitive to use. These are hallmarks of salaried professionals.

Plaintiff J. Lewis, a former TW for Epic, filed the above-captioned case on February 10, 2015 on behalf of himself and a similarly-situated class of TWs. (Dkt. # 1, *Lewis* Collective and Class Action Complaint.) This complaint alleges Epic has deprived TWs of overtime pay in violation of the FLSA. Like Epic's QA employees, TWs are entry-level, non-technical Epic employees. (*Lewis* Collective and Class Action Complaint.) TWs prepare end-user materials to accompany Epic's software, a job which Lewis alleges does not require technical expertise or the exercise of discretion, again similar to the QAs' claims. (Id. at ¶¶ 12, 14-15.) Both TWs and QAs work over 40 hours per workweek, and both are classified by Epic as overtime exempt. (Id. at ¶¶ 10, 18; *Nordgren* Collective and Class Action Complaint at ¶¶ 10, 13.) On April 13, 2015, Epic filed a motion to dismiss this case and compel individual arbitration, alleging that Lewis is bound by the arbitration contract to bring his wage claim individually through arbitration. (Dkt. # 19, Defendant's Motion to Dismiss and Compel Individual Arbitration ("Def. Br.").)

LEGAL STANDARD

Epic, relying on case law that compels arbitration where a valid agreement to arbitrate exists, maintains that Lewis must arbitrate this case. (Def. Br. at 5-6.) However, Epic's argument avoids the important first question in this case: whether any valid agreement to arbitrate exists. As the Federal Arbitration Act ("FAA") itself states, "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4.

In opposing arbitration, Plaintiff contends that, under Wisconsin contract law, no valid arbitration contract exists in the first place. The FAA's presumption in favor of arbitration does not apply to this inquiry. *See* Druco Restaurants, Inc. v. Steak N Shake Enterprises, Inc., 765 F.3d 776, 781 (7th Cir. 2014) (internal citations omitted); *see also* Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 758-59 (7th Cir. 2001) (internal citations omitted) ("While the Supreme Court has stressed… that federal policy under the FAA favors the enforcement of valid arbitration agreements…the Court has been equally adamant that a party can be forced into arbitration only if she has in fact entered into a valid, enforceable contract waiving her right to a judicial forum.").

To determine whether a valid agreement to arbitrate exists, a federal court looks to the state law that governs the formation of contracts. Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) (citing 9 U.S.C. § 2); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).

Plaintiff maintains that no agreement to arbitrate exists here because Epic's illusory promises are fatal to the formation of the contract.

If the court determines that an arbitration contract exists, the court may nevertheless invalidate it based on "generally applicable [state law] contract defenses, such as fraud, duress, or unconscionability." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996) (internal citations omitted); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011). The party resisting arbitration must show, as Plaintiff does here, that the contract is unconscionable. Felland v. Clifton, 2013 WL 3778967, *7 (W.D. Wis. July 18, 2013)[4] (citing Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 91 (2000)).

Although the FAA does not define the standard for a district court's review of a motion to compel arbitration, courts have held that "such motions 'are reviewed under a summary judgment standard.'" Henry Technologies Holdings, LLC, v. Giordano, 2014 WL 3845870, *3, (W.D. Wis. Aug. 5, 2014) (internal citations omitted). The party moving to compel arbitration bears the burden of demonstrating that the employment contract requires the parties to arbitrate. Id. Thus, if Epic fails to present sufficient evidence to support the conclusion that the arbitration contract requires Plaintiff to arbitrate, or if Plaintiff creates a genuine dispute of material fact, the court must deny the motion to compel arbitration and hold a trial on the question of whether a valid contract to arbitrate exists. *See* id.

ARGUMENT

Epic's motion to compel arbitration must fail for three reasons. First, the

[4] All unpublished cases are attached as Exhibit E to Parsons Dec.

arbitration contract is procedurally and substantively unconscionable to a fatal degree. It is procedurally unconscionable because Epic denied Plaintiff any opportunity to understand the contract's terms or to signal his rejection of them – effectively, Plaintiff had no meaningful choice to accept or deny the contract because Epic rendered him unable to reject its terms. The contract is substantively unconscionable because its terms are impermissibly one-sided in Epic's favor. Second, the arbitration contract must fail because it is not supported by consideration, given Epic's retention of the unfettered, unilateral right to alter its terms. Finally, the Agreement cannot stand because it impermissibly prevents Plaintiff from exercising their substantive federal right of collective action under Section 7 of the NLRA. Per the terms of the contract, should the Court deem the forced waiver of employees' right to act collectively unenforceable, that waiver provision must be severed and the case must proceed, collectively, in court.

I. THE ARBITRATION CONTRACT IS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE AND THEREFORE CANNOT BE ENFORCED

The FAA explicitly preserves state law contract defenses such as unconscionability to arbitration contracts.[5] 9 U.S.C. § 2; Concepcion, 131 S. Ct. 1740, 1746 (2011). In Wisconsin, courts weigh procedural and substantive factors on a case-by-case basis to determine whether a contract is unconscionable. Villalobos v. EZCorp., Inc., 2013 WL 3732875, *2 (W.D. Wis. July 15, 2013) (citing Wis. Auto Title Loans v. Jones, 2006 WI 53, ¶¶ 29, 33, 290 Wis. 2d 514, 714 N.W.2d 155; Disc.

[5] Epic claims that § 2 of the FAA "plainly states that agreements to arbitrate 'shall be valid, irrevocable, and enforceable.'" This quote omits the remainder of the statute's final sentence: "save upon such grounds as exist at law or in equity for the revocation of any contract." (Def. Br. at 4.)

Fabric House of Racine, Inc., 117 Wis. 2d 587, 602, 345 N.W.2d 417 (1984). Unconscionability is the "absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party." Jones, 2006 WI 53, ¶ 32.

A. The Purported Formation of the Arbitration Contract Exhibits a High Degree of Procedural Unconscionability

The procedural unconscionability inquiry "requires examining factors that bear upon the formation of the contract, that is, whether there was a 'real and voluntary meeting of the minds' of the contracting parties." Jones, 2006 WI 53, ¶ 34. Such factors include, but are not limited to:

> [A]ge, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, [and] whether alterations in the printed terms would have been permitted by the drafting party….

Id. Consideration of these factors here compels the conclusion that the formation of Epic's arbitration contract is procedurally unconscionable.

The Supreme Court recognized decades ago the basic fact of the inequality of bargaining power between an employee and employer. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 fn.18 (1945). Here, a multi-billion dollar corporation imposed a one-sided arbitration contract upon its employees; this power imbalance must factor into the court's unconscionability analysis.

In addition to the inherent power imbalance between any employee and employer, Epic imposed this contract upon its employees without providing them any opportunity to gather more information about the contents of the contract, misled employees about their rights under the contract, and disseminated inaccurate information about the other wage and hour litigation filed against Epic. These factors, reviewed collectively, demonstrate that the procedural unconscionability of this contract is fatal.

1. Epic Used its Superior Bargaining Power to Subject Plaintiff to the Arbitration Contract Without Any Opportunity to Reject It

In Wisconsin, arbitration contracts are "adhesion" contracts where the drafting party presents them on a take-it-or-leave-it basis with no opportunity to opt out of or negotiate the contract's terms. Coady v. Cross Country Bank, 2007 WI App 26, ¶ 35, 299 Wis. 2d 420, 729 N.W.2d 732. Courts have recognized that this take-it-or leave-it tactic evidences procedural unconscionability because it exploits the disparity in bargaining power between contracting parties. Id. (citing Jones, 2006 WI 53, ¶¶ 52-53). *See also* Hankee v. Menard, Inc., 2002 WL 32357167, *4 (W.D. Wis. Apr. 15, 2002) (internal citation omitted) (evidence that an agreement resulted from the use of overwhelming economic power suggests it was a product of unequal bargaining power, not a meeting of the minds.)

The coercive means by which Epic disseminated the arbitration contract thwarted any "real and voluntary meeting of the minds" between the contracting parties. *See* Jones, 2006 WI 53, ¶¶ 53, 57. Epic presented employees with a misleading email claiming arbitration allows them to pursue claims as if they were in court (although they cannot), and that if they had questions they could seek additional information (although those requesting such information did not receive it). (*See* Rogers Dec.)

But according to the language of the contract, employees were subject to its terms the moment it was sent—as such, it is not even clear that quitting their jobs would allow employees to effectively reject the contract's terms. That is, unlike Hankee, Epic's contract does not even permit employees the choice of rejecting it (and then seeking other employment). *See* Hankee, 2002 WL 32357167 *4.[6] Thus, employees were powerless to escape the terms of their presumptive abandonment of their right to bring wage claims in court.

Under these circumstances, Plaintiff and the other TWs' "acceptance" of the contract cannot be considered "real and voluntary"—they had no *meaningful* choice whatsoever. Because employees had no option to reject the contract, and were unable to obtain more information about the contract despite Epic's representation that they could do so,[7] the contract is procedurally unconscionable. *See* Brennan v. Bally Total Fitness, 153 F. Supp. 2d 408, 416 (S.D.N.Y 2001) (no "meaningful choice" to voluntarily assent to arbitration where employees had only a few minutes to read the 14-page document while employer talked on the phone).

2. Epic Misled Technical Writers Regarding the Current Wage Litigation it Faced and Regarding Their Rights under the Arbitration Contract

[6] Most Epic employees are also subject to a non-compete agreement (Marc Eisen, *Epic Systems backs down on noncompete clause*, Isthmus, Dec. 2, 2014, http://www.isthmus.com/news/news/epic-systems-backs-down-on-noncompete-clause/.), which would further limit their ability to seek other employment *even if* it was clear from the arbitration contract that quitting was required to escape its terms, furthering the imbalance between the bargaining parties.

[7] Plaintiff attempted to gather information from Epic to determine whether a meaningful process was in place that would have permitted TWs to obtain more information about the arbitration contract, but Epic refused to produce responsive documents and the Court denied Plaintiff's motion to compel this information. (Snapp Dec.; Court's Order on Plaintiff's Motion to Compel.) Plaintiff has the sworn statements of two individuals who were not given the opportunity to gather more information, despite being promised this opportunity by Epic's email. (Campell Dec.; Rogers Dec.)

The timing of the arbitration contract during a pending class wage and hour case, and Epic's misleading statements to employees about that litigation, further highlight that the contract to arbitrate does not manifest a "real and voluntary meeting of the minds." *See* Jones, 2006 WI 53, ¶ 57. The April 2, 2014 email enclosing the arbitration contract, which Epic sent in the midst of defending a misclassification class action, mischaracterized both the nature of that suit and the nature of the arbitration available under the contract.

First, the email stated that the *Nordgren* suit involving QAs is "claiming that some of our salaried professionals should be re-classified as hourly employees." (Arbitration Email.) In fact, Nordgren claimed that Epic misclassified QAs as overtime-exempt and owed them wages for the hours over 40 that they worked. This claim, of course, does not require that QAs become hourly employees. Rather, Epic appears to have framed the *Nordgren* suit in this way to suggest that the QA litigation sought to degrade Epic's employees.[8]

Second, Epic's email claimed that "[a]rbitration will allow you to pursue your individual claims as if you were in court." This statement is both false and misleading, as the arbitration contract proscribes class actions —a right which Epic employees have in court. Nor does Epic explain the procedural aspects of litigation that its arbitration contract foreclosed. For example, the arbitration contract limited employees to a single interrogatory in discovery. A non-attorney could not be

[8] Plaintiff attempted to depose Erik Phelps, the individual who wrote this email, in part to determine whether this description of the *Nordgren* suit was intentionally misleading; Epic refused to produce Phelps for a deposition. (Parsons Dec. Ex. A, Defendant's Answers to Plaintiff's First Set of Interrogatories, Answer to Interrogatory No. 2; Snapp Dec.)

expected to recognize or understand the importance of distinctions such as these.

Perhaps these misleading statements would have been less harmful had Epic's employees been able to get more information concerning the arbitration contract. Epic, however, misled employees about their ability to ask questions about the contract before assenting. As opt-ins Campbell and Rogers have stated, despite asking specific questions about the contract (Rogers Dec. at ¶ 6) and not responding under the belief that someone from Epic would talk with her about the contract (Campbell Dec. at ¶ 5), Epic did not follow up with its employees or provide the opportunity for further discussions about arbitration.

Such conduct demonstrates Epic's failure to provide the meaningful choice necessary for procedural conscionability and the contracting parties' failure to reach a meeting of the minds. *See* Geiger v. Ryan's Family Steak Houses, Inc., 134 F.Supp.2d 985, 998 (S.D. Ind. 2001) ("[I]n affording…an opportunity to receive answers to any questions that applicants might have about the agreement, we do not think that the Defendants can thereafter fairly rely on a presumption that the applicant has understood the agreement's provisions.").

3. Epic Failed to Disclose to Technical Writers that They May Have Had Pending Claims

Epic did not disclose that TWs may have had wage claims before imposing the arbitration contract on them and preventing them from being able to bring those claims in court as a class.[9] Under Wisconsin contract law, "[n]on-disclosure can form the basis for a misrepresentation sufficient to allow the avoidance of a

[9] Plaintiff's requests for discovery as to whether Epic performed any sort of review of its potential liability following the *Nordgren* suit was also rejected. (Snapp Dec.)

contract obligation…." First Nat. Bank and Trust Co. of Racine v. Notte, 97 Wis. 2d 207, 219, 293 N.W.2d 530 (Wis. 1980) (citing Restatement (Second) of Contracts, s. 303 (Tent. Draft No. 11, 1976)). Courts have applied this principle to putative class members who have no way of knowing that, "by failing to reject the arbitration clause, they were forfeiting their rights as potential plaintiffs in [the litigation]." In re Currency Conversion Fee Antitrust Litigation, 361 F. Supp. 2d 237, 251 (S.D.N.Y 2005). Under such circumstances, courts have found unconscionability where "a non-drafting party has no way of knowing a material fact." Id. (citing Mobile Elec. Service, Inc. v. FirsTel, Inc., 649 N.W.2d 603, 606 (S.D. 2002)); Johnson v. Rapid City Softball Ass'n, 514 N.W.2d 693, 697 (S.D.1994) ("A release is not fairly made and is invalid if the nature of the instrument was misrepresented or there was other…overreaching conduct."); Ryan v. Weiner, 610 A.2d 1377, 1382 (Del. Ch. 1992).

4. The Dissemination of the Contract Was Marked by Other Factors of Procedural Unconscionability

As discussed above, the contract is not the product of a real and voluntary meeting of the minds but of an exertion of superior bargaining power that acted to mislead employees about their rights and to stymie any meaningful choice they had to reject the arbitration contract. Nearly all of the other factors that courts consider in the procedural unconscionability analysis further underscore this reality. For example, Epic possessed significantly more business acumen and experience than employees; Epic unilaterally drafted the contract; Epic permitted no alterations to the contract's non-negotiable terms; and, most significantly, as discussed above, Epic provided no opportunity for employees to gain understanding of the contract's terms and no method by which employees could signal their (albeit futile) disagreement with the terms. (*See, e.g.*, Rogers Dec. at ¶ 6 (questions Rogers asked pertaining to the arbitration agreement that went unanswered).)

In sum, while any one of the factors discussed above may not alone show procedural unconscionability, that they all played a role in the formation of this contract compels the conclusion that it is highly procedurally unconscionable. Epic misled its employees through false statements and concealment of significant facts, using its heavy weight to foreclose any opportunity for employees to understand or reject the contract's terms. Epic cannot pretend arbitration is a magic word that sanctions such conduct: "Federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power." Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 927 (9th Cir. 2013).

B. The Contract Is So One-Sided As to Be Substantively Unconscionable

Wisconsin law does not articulate any precise definition of substantive unconscionability; rather, the concept refers to whether a contract's terms are "unreasonably favorable to the more powerful party." Jones, 2006 WI 53, ¶ 36. As such, the focus of the substantive unconscionability analysis is the "one-sidedness, unfairness, unreasonableness, harshness, overreaching, or oppressiveness of the provision at issue." Id. at ¶ 59. Under this standard, Epic's arbitration contract manifests substantive unconscionability because the scope of its "covered claims" is limited to claims—whether asserted or unasserted—that employees, not Epic, would bring. Specifically, under the arbitration contract, *only* claims pertaining to wages and hours (such as for underpayment of wages, misclassification as overtime exempt, or off-the-clock uncompensated work) are subject to mandatory arbitration.

In contrast, Epic's ability to sue in court remains essentially unbridled. For example, should Epic ever choose to bring a claim against a former employee relating to its strict non-compete agreement, Epic would be free to do so in court. Marc Eisen, *Epic Systems backs down on noncompete clause*, Isthmus, Dec. 2, 2014, http://www.isthmus.com/news/news/epic-systems-backs-down-on-noncompete-clause/. While in theory Epic must arbitrate an "overpayment" claim, Epic has never to date made such a claim against an employee. (Parsons Dec. Ex. A, Defendant's Answers to Plaintiff's First Set of Interrogatories, Answer to Interrogatory No. 11.) The severe asymmetry of this contract renders it unreasonably favorable to Epic.

Courts have rejected such one-sided contracts as substantively unconscionable. For example, the Wisconsin Supreme Court observed that the "doctrine of substantive unconscionability limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum for itself." Jones, 2006 WI 53, ¶ 66. This degree of one-sidedness *alone* rendered the arbitration agreement substantively unconscionable. Id. at ¶ 68 (citing, among other cases, Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 169 (5th Cir. 2004) (arbitration provision requiring any claim customers are likely to bring be raised in arbitration while allowing drafter to raise its claims against customers in court unconscionable); Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 784–86 (9th Cir. 2002) (holding unconscionable under California law employment contract compelling arbitration of claims employees are most likely to bring against employer, but not claims employer is most likely to bring against employee); Taylor v. Butler, 142 S.W.3d 277, 286 (Tenn. 2004) (arbitration provision that provides "a judicial forum for practically all claims" that drafter could have against purchaser but assigning any claims by the purchaser to arbitration unconscionable).

The principle underlying these cases is that arbitration contracts restricting, either explicitly or in practice, their application to the weaker party's claims are impermissibly one-sided. Epic's arbitration contract explicitly limits its covered claims to any asserted or unasserted wage and hour violations. The very real effect of this definition is to restrict *only* its employees to arbitration, while Epic is free to bring its claims in whatever venue it pleases, rendering the contract impermissibly one-sided and substantively unconscionable. *See* Jones, 2006 WI 53, ¶ 66.

The substantive and procedural unconscionability of the arbitration contract are fatal. This contract unreasonably favors an employer with superior bargaining power, who has not only imposed a contract that limits its employees to arbitration while preserving the option to go to court itself, but also imposed that contract while misleading its employees as to its contents and denying them any meaningful chance to become better informed or even weigh their options.

II. THE PURPORTED CONTRACT LACKS CONSIDERATION AND THEREFORE NO VALID CONTRACT TO ARBITRATE EXISTS

A. Arbitration Contracts that Are Subject to Unilateral Modification or Revocation Are Illusory and Therefore Lack Consideration

The one-sidedness of the arbitration contract speaks not only to substantive unconscionability, but also of a more fundamental failure: because Epic has actually promised nothing in return for Plaintiff's "agreement" to arbitrate, the purported contract lacks consideration. Specifically, under the arbitration contract, Epic retains the unfettered, unilateral right to alter or abandon it. This reservation means, in effect, Epic has given up nothing at all in forming the contract, and thus it is not supported by consideration. Therefore, no valid contract to arbitrate exists. *See* Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 636 (7th Cir. 1999) (citing NBZ, Inc. v. Pilarski, 185 Wis. 2d 827, 520 N.W.2d 93, 96 (Wis. Ct. App. 1994)); Gibson, 121 F.3d at 1131.

As with the unconscionability analysis, courts apply state law to determine if a contract is supported by consideration. Id. at 1130. The FAA's presumption in favor of arbitration does not apply "when deciding whether there is an agreement to arbitrate in the first instance." Druco, 765 F.3d at 781. *See also* Kaplan, 514 U.S. at 944-45. Accordingly, ambiguities surrounding the formation of the contract—including the question of consideration—are not resolved in favor of arbitration. Druco, 765 F.3d at 781. (citing MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc., 802 N.E.2d 901, 906-07 (Ind. 2004) ("a court must determine under applicable state law whether the parties generally agreed to arbitrate disputes, without being influenced by the federal policy in favor of arbitration.").

Under Wisconsin law, a valid contract requires consideration. Michalski, 177 F.3d at 636 (citing Pilarski, 520 N.W.2d at 96). This principle applies to contracts between an employer and employee. See Pilarski, 520 N.W.2d at 96 (1994). In essence, consideration is evidence of the *intent* to be bound to the contract. Id. (citing 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 11, 112 (1963)) (emphasis added). Accordingly, to determine if a contract is supported by consideration, courts look beyond the employer's *purported* pledge to be bound by the terms of a contract to discern whether the employer *actually intends* to be so bound. Epic's modifications and amendments clause means it clearly does not intend to be bound, and as such, this contract fails.

1. Wisconsin Precedent States that If the Contract Does Not Constrain the Promisor in Any Way, the Promise Is Illusory

Where an employer does not actually intend to be bound by a contract, the employer has in reality furnished only "an illusory promise." DeBruin v. St. Patrick Congregation, 2012 WI 94, ¶ 40, 343 Wis. 2d 83, 816 N.W.2d 878 (internal citations omitted) (Crooks, J., concurring). Wisconsin law defines an illusory promise as one which does not constrain the alleged promisor to the contract's terms by virtue of the "promisor's" retention of the *option* to perform the contract's terms. *See* Devine v. Notter, 2008 WI App 87, ¶ 4, 312 Wis. 2d 521, 753 N.W.2d 557. In other words, "even if a present intention is manifested, *the reservation of an option to change that intention* means that there can be no promise who is justified in an expectation of performance." DeBruin, 2012 WI 94, ¶ 45 (quoting Restatement (Second) of Contracts § 2 cmt. e (1981) (emphasis added)). In contrast, "the fundamental element" of an *actual* promise is the "promisor's expression of intention that the promisor's *future* conduct shall be in accord with the *present* expression...." Id. (quoting Joseph M. Perillo, Corbin on Contracts § 1.17, at 47 (rev. ed.1993) (emphasis added)).

By the explicit terms of the arbitration contract, Epic retains the unfettered right to alter or abandon it. Specifically, the "Modifications and Amendments" provision vests in Epic the unilateral and unlimited power to "**change** or **terminate** this agreement after giving [employees] 90 days written or electronic notice. Any change or termination will not apply to a pending claim." (Arbitration Contract.)

Epic's purported promise to arbitrate wage claims is an illusory promise under Wisconsin law. On April 2, 2014, Epic ostensibly promised to arbitrate its wage claims according to the terms of the contract. But the same contract provided Epic the option to change that promise in the future. Unlike an actual promise (i.e., one that commits the promisor's future conduct to its present intention), Epic's future conduct may *not* be in accord with its present expression—its promise to arbitrate is therefore illusory. *See* DeBruin, 2012 WI 94, ¶ 45.

2. An Illusory Promise is Fatal to Forming a Contract to Arbitrate because Illusory Promises Do Not Provide Consideration

A lack of consideration necessarily follows from the lack of intent to be unequivocally bound by the contract's terms. Wisconsin law is clear:

> 'If a party to a purported contract has, in fact, made only illusory promises and therefore not constrained him- or herself in any way, he or she has **given no consideration and therefore no contract exists**.'

DeBruin, 2012 WI 94, ¶40 (citing Devine, 2008 WI App 87, ¶ 4, for the proposition that "since the maker of an illusory promise assumes no detriment or obligation, an illusory promise is not regarded as consideration").

In the arbitration context, an employer's *actual* promise to arbitrate its claims given in exchange for an employee's agreement to the same constitutes consideration. Tinder v. Pinkerton Security, 305 F. 3d 728, 734 (7th Cir. 2002) (citing Michalski, 177 F.3d at 636). But as discussed in detail below, where the employer retains for itself the explicit and exclusive *option* to modify the contract or terminate it altogether—precisely as Epic does here—courts have recognized that the "promise" to arbitrate is illusory. An illusory promise lacks consideration and is therefore not a valid contract. Michalski, 177 F.3d at 636.

For example, the Seventh Circuit recently reviewed the validity of arbitration clauses under which franchisees were required to arbitrate their claims against the franchisor Steak 'n Shake, but Steak 'n Shake had the unilateral and unrestricted right to amend, modify, or terminate the arbitration agreement. Applying Indiana law, the Seventh Circuit articulated:

> An illusory promise is a promise which by its terms makes performance entirely optional with the promisor." *Pardieck v. Pardieck*, 676 N.E.2d 359, 364 n. 3 (Ind.App.1997). *See also* Restatement (Second) of Contracts § 2 cmt. e (1981)…. Under that standard, the district court correctly found that the franchise agreements' arbitration clauses were illusory because performance was "entirely optional" with Steak 'n Shake.

Druco, 765 F.3d at 782 (Rovner, J); *see also* Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315-16 (6th Cir. 2000) (applying Tennessee and Kentucky law);

Penn, 269 F.3d 753 (applying Indiana law); Geiger, 134 F. Supp. 2d 985, 1000 (S.D. Ind. 2001) ("[w]here a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory.").

An employer's "promise" to arbitrate employment-related claims with its employees is illusory where the employer reserves the right to amend, supplement, or revise the arbitration contract. *See, e.g.,* Dumais v. American Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002) ("join[ing] other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory" and rejecting the employer's "contention that the strong presumption favoring arbitration requires [it] to ignore the contract's illusory nature" because the presumption "disappears when the parties dispute the existence of a valid arbitration agreement"); J.M. Davidson Inc. v. Webster, 128 S.W. 3d 223, 230 n. 2 (Tex. 2003) (agreeing with and noting that "most courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory").

By reserving for itself the right to revise the terms of this contract at any time, Epic has effectively devised a trap door out of the arbitration contract. If Epic had an unfiled claim against an employee that it wished to bring in court rather than in arbitration, Epic could simply give notice that it was changing the contract, and then file the accrued claim in court. TWs have no such option to escape from under the arbitration contract at their whim. As a result, Epic has not truly given up anything in making this contract, though its employees undoubtedly have. Under Wisconsin contract law, because Epic "has, in fact, made only illusory promises and therefore not constrained [itself] in any way," Epic has "given no consideration and therefore no contract exists." DeBruin, 2012 WI 94, ¶ 43.

B. The Notice Provision Does Not Alter the Conclusion that Epic's Promise Is Illusory

Furthermore, courts have recognized that including a notice provision where a party has retained the exclusive right to modify or terminate a "mutual" agreement does not cure the illusory nature of that promise. For example, the Fifth Circuit declared illusory an arbitration clause that did *not* preclude "application of amendments to disputes which arose (or of which Amway had notice) before the amendment," even though the contract required Amway to provide notice of such amendments. Morrison v. Amway Corp., 517 F.3d 248, 257 (5th Cir. 2008); s*ee also* Carey v. 24 Hour Fitness, 669 F.3d 202, 207 (5th Cir. 2012). These holdings are consistent with the definition of an illusory promise: by notifying employees of changes in the terms of an agreement to which the employees are bound, an employer has in no way *constrained* its option to implement such changes at any time. Rather, the employer simply openly exercised the very option that it retained for itself in the first place.

Accordingly, Epic cannot point to superficial constraints such as notice and exemption of filed claims to transform its illusory promise into one supported by consideration.[10] By providing employees 90 days' notice of Epic's intent to amend/terminate the contract, Epic has in no way constrained itself from changing the terms of the contract. *See* Morrison, 517 F.3d at 254; Carey, 669 F.3d at 207. Indeed, Epic's modifications clause permits it to change the contract so it need not provide any notice at all. *See* Keanini v. United Healthcare Services, Inc., 33 F. Supp. 3d 1191, 1198-99 (D. Hawai'i 2014).

Moreover, several courts have recently held that contracts to arbitrate are illusory if they allow employers to amend terms that would govern claims which either had already accrued or which the employer already knew about at the time of amendment. For example, the New Mexico District Court rejected as illusory an arbitration contract that reserved the employer's right to unilaterally amend the contract "*after* [an employee's] claim has accrued, but *before* arbitration proceedings are initiated." Flemma v. Halliburton Energy Services, Inc., 303 P. 3d 814, 822 (N.M. 2013) (emphasis in original); *see also* Keanini, 33 F. Supp. 3d at 1194-97 (rejecting an arbitration contract as illusory based on a provision reserving the employer's right to amend, modify, or terminate the arbitration contract with 30 days' notice, but without exempting from such amendment any claims accrued or known to the employer at the time of amendment); Phox v. Atriums Management Co., 230 F. Supp. 2d 1279, 1283 (D. Kan. 2002) (arbitration provision that gave the employer "the unilateral right to revise or cancel the arbitration clause before plaintiff filed a claim" was illusory); Peleg v. Neiman Marcus Group, Inc., 204 Cal. App. 4th 1425, 1432-33 (2012) (arbitration provision that required 30 days' notice and was inapplicable to filed claims was nevertheless illusory because such changes would still apply to accrued claims). This well-reasoned line of cases simply upholds the long-standing and irrefutable contract principles behind illusory promises. That is, if an employer can unilaterally modify or terminate contractual terms pertaining to accrued claims, the employer's purported promise to arbitrate such claims according to the presently stated terms is illusory.[11]

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[10] Epic's vague qualifications actually give rise to numerous ambiguities: Must Epic provide 90 days' notice *of* the modification itself, or merely that it intends to make a unilateral change? Does the modification or termination become effective 90 days from the notice, or some other time? Relatedly, when and how may an employee assent to or reject such modifications? That the contract cannot even answer these questions underscores the meaninglessness of these provisions in determining whether Epic's promise was illusory.

III. THE CONTRACT'S CLASS ACTION WAIVER VIOLATES PLAINTIFF'S SUBSTANTIVE RIGHTS GUARANTEED UNDER THE NATIONAL LABOR RELATIONS ACT

Epic's wage claim arbitration contract contains a class and collective action waiver that strips Plaintiff and all TWs of their "core substantive right" under the National Labor Relations Act ("NLRA") to engage in collective legal action. *See* In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), 2012 WL 36274, *12. As such, under the NLRA's plain language and under this Court's germane analysis in Herrington v. Watersone Mortg. Corp., 2012 WL 1242318 (W.D. Wis. March 16, 2012) ("Herrington I"), Epic's attempt to force employees to waive joint, class, and

[11] Epic claims that Tinder v. Pinkerton Security, 2000 WL 34237496 (W.D. Wis., Sep. 25, 2000), *aff'd* 305 F. 3d 728 (7th Cir. 2002) is instructive, but the circumstances of this arbitration contract differ from those in Pinkerton. The plaintiff in Pinkerton received a brochure detailing Pinkerton's "Arbitration Program" one year into her employment. The brochure stated that Pinkerton was also bound by the arbitration provisions; it nowhere qualified that promise with Pinkerton's right to change the terms of the arbitration program. This Court rejected plaintiff's argument that an employment manual stating Pinkerton could change its policies at any time rendered Pinkerton's agreement to arbitrate illusory. Unlike Pinkerton, here Epic has reserved its right to alter the arbitration contract within the contract itself, making this case more akin to Flemma or Keanini than Pinkerton.

collective action cannot stand. In fact, both this Court and the National Labor Relations Board ("NLRB") have recently *reaffirmed* their holding that mandatory class action waivers in arbitration contracts violate employees' substantive statutory right under the NLRA. *See* Herrington v. Waterstone Mortg. Corp., 993 F. Supp. 2d 940 (2014) ("Herrington II"); AT&T Mobility Servs., LLC & Eudora Brooks, an Individual AT&T Mobility Servs., LLC & Juan Figuereo, an Individual, 22-CA-127746, 2015 WL 3955133 (June 26, 2015)[12]; Murphy Oil USA, Inc., 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014). Accordingly, Epic's class waiver provision is unenforceable. *See* Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83-84 (1982); J.I. Case v. NLRB, 321 U.S. 332, 337 (courts may not enforce individual employment contract provisions that violate the NLRA). Epic urges this Court to reconsider its decisions in Herrington, but the reasoning of those decisions is sound and clearly applicable to the instant case.

Courts give considerable deference to the NLRB's interpretations of the NLRA. Herrington II, 993 F. Supp. 2d at 943 (citing ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994)). As such, this Court recognized that courts must defer to the NLRB's determination that employers violate the NLRA by subjecting employees to arbitration contracts that deprive them of their federal right to bring joint, class, or collective FLSA actions in judicial or arbitral forums. Herrington II,

[12] NLRB ALJ Mindy E. Landow released its decision in AT&T Mobility on June 26, 2015, again reaffirming the NLRB's decision in D.R. Horton and Murphy Oil. Importantly, the arbitration agreement at issue in AT&T Mobility was voluntary rather than mandatory; however, ALJ Landow still found that the agreement implicated Section 7 rights under the NLRA. ALJ Landow also noted that "the purported 'voluntary' nature of any employee's decision as to whether to abide by such a policy, promulgated and endorsed by their employer, is open to question." Id. at 8:15-17.

993 F. Supp. 2d at 943 (citations omitted).

A. Section 7 of the NLRA Guarantees Employees the Substantive Federal Right to Collectively Pursue Wage Claims

Under Section 7 of the NLRA, "[e]mployees *shall* have *the right* to...engage in ...concerted activities for the purpose of...mutual aid or protection." 29 U.S.C. § 157 (emphasis added). The language of Section 7 is construed broadly so as not to "frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978) (quoting NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962)).

Both courts and the NLRB recognize that the pursuit of claims on a joint, class, or collective action basis constitutes protected concerted activity under Section 7. *See, e.g.*, Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011) ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the [NLRA]"); Trinity Trucking & Materials Corp., 221 NLRB 364, 365 (1975) ("filing of the civil action by a group of employees is protected activity"), enf'd NLRB v. Trinity Trucking & Materials Corp., 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978); Eastex, 437 U.S. at 565-66; D.R. Horton, 2012 WL 36274 at *12 (the longstanding "right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the [NLRA] and Federal labor policy rest.") (emphasis in original).

In Herrington II, this Court reaffirmed its agreement with the NLRB's foundational reasoning regarding the Section 7 right to bring wage claims on a class basis. Herrington II, 993 F. Supp. 2d at 943. Thus, Section 7 provides Plaintiff and the opt-ins to this case the *substantive federal right* to pursue their common claims for unpaid overtime wages on a concerted basis. As discussed in detail below, Epic violated this substantive federal right by imposing on its employees an arbitration contract that strips them of the ability to assert their claims collectively.

B. An Employer Violates the NLRA by Subjecting Employees to a Contract that Prohibits Collective Actions

An employer-mandated arbitration contract that deprives employees of the Section 7 right to pursue their claims on a class or collective basis violates Section 8(a)(1) of the NLRA, which explicitly provides that employers may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157…." 29 U.S.C. § 158(a)(1). Herrington II, 993 F. Supp. 2d at 943. Interpreting these provisions in tandem, the NLRB has held that

> [j]ust as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8.

D.R. Horton, 2012 WL 36274 at *7. The bottom line is that where an employer imposes a contract that "*explicitly* restricts activities protected by Section 7," the employer necessarily interferes with, restrains, or coerces employees in the exercise of Section 7 rights. Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), 2004 WL 2678632, *1 (emphasis in original).

Both Supreme Court and Seventh Circuit precedent also compel the conclusion that an employer's prohibition on employees' pursuit of wage claims on a class-wide basis also violates the NLRA. As the NLRB recognized in Murphy Oil:

> Because mandatory arbitration agreements like those involved in *D. R. Horton* purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid. The Supreme Court has explained recently that the Federal policy favoring arbitration, however liberal, does have limits. It does not permit a "prospective waiver of a party's right to pursue statutory remedies," such as a "provision in an arbitration agreement forbidding the assertion of certain statutory rights." Insofar as an arbitration agreement prevents employees from exercising their Section 7 right to pursue legal claims concertedly—by, as here, precluding them from filing joint, class, or collective claims addressing their working conditions in any forum, arbitral or judicial—the arbitration agreement amounts to a prospective waiver of a right guaranteed by the NLRA.

Murphy Oil, 2014 WL 5465454 at *11. *See also* D.R. Horton, 2012 WL 36274 at *6 (quoting J. I. Case Co., 321 U.S. at 337) ("individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA].").

Epic's arbitration contract unquestionably violates the NLRA because it prohibits employees from exercising their right to pursue their wage claims on a concerted basis. Epic cannot escape liability for its violation of Section 7 and 8(a)(1) by fashioning its restraint on an employee's guaranteed federal rights as an arbitration contract. Sections 7 and 8(a)(1) draw an indelible line that protects employees' rights to engage in concerted activity, and concerted activity includes pursuing legal claims on a class or collective basis. D.R. Horton, 2012 WL 36274 at

*12; Herrington II, 993 F. Supp. 2d at 943. Epic's class and collective action prohibition runs afoul of the plain language of the NLRA, the NLRB's longstanding interpretation of it (which is entitled to judicial deference), and precedent from this Court, from the Seventh Circuit and the Supreme Court.

C. As this Court Recognized in Herrington II, the Fifth Circuit's Reversal of the NLRB's Decision in D.R. Horton Is Inapposite and Unpersuasive

Although the facts before the Court now fall squarely under this Court's analysis in Herrington II, Epic tells the Court that the decision "should not affect its ruling here," largely because other non-precedential courts have followed the Fifth Circuit's rejection of D.R. Horton. (Def. Br. at 10). But this Court explicitly repudiated the Fifth Circuit's purported reasons for overturning D.R. Horton.

First, this Court rightly rejected the Fifth Circuit's unfounded suggestion that a substantive federal right was not at issue, reiterating that the Section 7 right to engage in collective legal action (by invoking Rule 23 or Section 216(b)) is the core *substantive* right protected by the NLRA. Herrington II, 993 F. Supp. 2d at 944 (citing D.R. Horton, 2012 WL 36274, at *12 (internal citations omitted)).

Second, this Court noted that the NLRA does not explicitly override the FAA because such explicit language is unnecessary given the well-established principle that an arbitration agreement simply may not require a party to waive a substantive federal right. Herrington II, 993 F. Supp. 2d at 944.

Similarly, this Court found the question of whether the NLRA provides a private cause of action irrelevant. Herrington II, 993 F. Supp. 2d at 944 (citing D.R. Horton, 737 F.3d at 360, n. 9). Again, in D.R. Horton, Herrington, and the present case, the fundamental fact is that an arbitration contract with a no-class provision deprives employees of their substantive federal right under the plain language of the NLRA. Because **courts may not enforce contracts that violate the NLRA**, it is irrelevant that the employee's cause of action rests on the FLSA. Herrington II, 993 F. Supp. 2d at 944-45 (citing Kaiser Steel Corp., 455 U.S. at 86; Jasso v. Money Mart Express, Inc., 879 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012)).

Finally, this Court corrected the Fifth Circuit's inaccurate assertion that "[e]very one of our sister circuits to consider the issue has either suggested or expressly…held arbitration agreements containing class waivers enforceable." Herrington II, 993 F. Supp. 2d at 946 (internal citations omitted). In fact, the Ninth Circuit amended its opinion to find only that the plaintiff forfeited the argument; the Second Circuit did not explain its failure to defer to the NLRB; and the Eighth Circuit improperly permitted an employer to determine on its own which concerted activities are "protected" (i.e., those brought to the DOL) and which are not (i.e., those that would be brought in arbitration or court).[13]

D. There is No Actual Conflict Between the FAA and the NLRA

In D.R. Horton, the NLRB held that its rejection of a class waiver in an arbitration agreement neither conflicts with the FAA nor undermines pro-arbitration policy. D.R. Horton, 2012 WL 36274 at *10. In overturning the NLRB's decision, the Fifth Circuit summarily asserted the FAA as grounds for reversing the

[13] Epic's arbitration contract engages a similar attempt to distract from the fact that it waives a substantive federal right by citing that employees remain free to bring their claims to the DOL. As this Court has made clear, however, it is not up to Epic to decide where its employees may exercise the rights guaranteed to them by Section 7 of the NLRA.

NLRB and improperly held that D.R. Horton is inconsistent with the Supreme Court's reasoning in Concepcion. *See* D.R. Horton, 737 F.3d at 359-60 (citing Concepcion, 131 S.Ct. at 1746-52). *See also* Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (8th Cir. 2013). Although this Court found that the Fifth Circuit made some "valid points" with respect to its reliance on Concepcion, it solidly reaffirmed the distinction between Concepcion, which did not involve the waiver of a substantive federal right, and the issue of whether concerted action waivers violate the NLRA. *See* Herrington II, 993 F. Supp. 2d at 945.

Indeed, this distinction is critical because an entirely different analysis applies where two federal statutes allegedly conflict (as is the case here), as opposed to where the FAA allegedly preempts a state law (as was the case in Concepcion). Concepcion turned solely on whether the FAA *preempted* a state law "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." Concepcion, 131 S.Ct. at 1744. But in this case, preemption principles are inapposite. Even if in direct conflict, one federal statute cannot preempt another—the FAA cannot *preempt* the NLRA. *See* Baker v. IBP, Inc., 357 F.3d 685, 688 (7th Cir. 2004). Instead, whether two federal statutes *conflict* depends on whether Congress intended to repeal part or all of the previously enacted statute (here, the NLRA) by enacting the subsequent, allegedly inconsistent statute (here, the FAA). Id. And, even when two federal laws cover the same subject, courts must give effect to both if possible. *See* J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Intern., Inc., 534 U.S. 124, 142 (2001) ("stringent" standard requires "irreconcilable conflict"); AT&T Mobility, at 11; Murphy Oil, 2014 WL 5465454 at *9 (the NLRB and courts "must carefully accommodate *both* the NLRA and the FAA") (emphasis in original).

The FAA does not implicitly repeal the NLRA, but rather explicitly maintains that an arbitration contract is unenforceable if legal grounds exist for its revocation. 9 U.S.C. § 2. *See also* Murphy Oil, 2014 WL 5465454, at *7; D.R. Horton, 2012 WL 36274 at *11-12. As such, the FAA *itself* accommodates Sections 7 and 8(a)(1) of the NLRA, which provide grounds for revoking arbitration contracts that interfere with employees' substantive federal right to pursue claims for unpaid overtime on a class or collective basis. The policies of the FAA do not conflict with this necessary result, but rather preserve it. Indeed,

> the purpose of Congress [in enacting the FAA] was to make arbitration agreements as enforceable as other contracts, *but not more so*. To immunize an arbitration agreement from judicial challenge [on grounds applicable to other contracts] would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'"

Prima Paint Corp. v. Flood & Conklin Mfg. Co, 388 U.S. 395, 404 n.12 (1967) (emphasis added). *See also* Murphy Oil, 2014 WL 5465454, at *7 (observing that its reasoning is consistent with the FAA because it "treats an arbitration agreement no less favorably than any other private contract that conflicts with federal law"). Thus, the FAA's implied policy favoring enforcement of arbitration *purposefully* does not cover arbitration contracts that would be void as a matter of law, as Epic's contract is under the plain language of the NLRA. Epic cannot rely on the FAA to validate its deprivation of Plaintiff's federal substantive right because no conflict exists between the FAA and the NLRA.[14]

Consistent with the FAA's savings clause, the Supreme Court has held that the federal policy favoring arbitration contracts must yield where such contracts deprive parties' of substantive statutory rights. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S 614, 628 (1985) for the proposition that "'[b]y agreeing to arbitrate a statutory claim, a party does not **forgo the substantive rights afforded by the [federal] statute**....'") (emphasis added).The Supreme Court's recent analysis in American Exp. Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013) supports this conclusion. There, the Court affirmed that where arbitration contracts make the exercise of statutory rights *impossible* by outright prohibition of *the assertion of such rights*, they are invalid as "'prospective waiver[s] of a party's *right to pursue* statutory remedies.'" *Id.* at 2310 (quoting Mitsubishi, 473 U.S. at 637 n.19 (emphasis in original)). Epic's arbitration contract explicitly calls for the prospective waiver of its employees' right to pursue collective legal action guaranteed by the

[14] Even if the NLRA and the FAA did conflict, the rights guaranteed by the NLRA are fundamental and must take priority over the FAA's implicit and qualified pro-arbitration policy. Federal labor policy, as embodied in the NLRA, has expressly protected the fundamental right to engage in concerted activity for over 80 years. *See* Murphy Oil, 2014 WL 5465454 at *18 ("The employer's imposition of a mandatory arbitration agreement requiring employees to bring all workplace claims individually—and forbidding them access to any group procedure—reflects and perpetuates precisely the inequality of bargaining power that the Act was intended to redress."); *see also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981). The FAA, in contrast, does not expressly call for a "streamlined" (i.e., individual) model of arbitration. Indeed, the stated purpose of the FAA was to put arbitration contracts "on equal footing" with any other contracts. Concepcion, 131 S.Ct. at 1745. Consistent with that goal, the FAA's preference for arbitration is subject to the § 2 savings clause for otherwise unenforceable contracts that deprive parties' of substantive statutory rights (i.e., the substantive right under the NLRA to pursue collective legal actions). Epic simply cannot lean on a federal policy favoring arbitration to uphold its patent violation of federal labor policy.

NLRA. *See* Murphy Oil, 2014 WL 5465454 at *1. As such, under a long line of Supreme Court precedent from Mitsubishi Motors to Italian Colors and consistent with the FAA's savings clause, Epic's arbitration contract is unenforceable.

In sum, Sections 7 and 8(a)(1) of the NLRA protect employees' fundamental and substantive federal statutory right to engage in concerted activity. Collective legal action constitutes concerted activity. Arbitration contracts that deprive employees of the right to pursue collective legal action thus violate the NLRA, and cannot be enforced by courts. The FAA does not alter, but in fact preserves, this conclusion. Applied here, these principles unequivocally establish that the class waiver in Epic's arbitration contract is unenforceable. According to the contract's own terms, this result means that "any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims." (Arbitration Contract.) Thus, this Court must reject Epic's motion to compel arbitration and instead allow Plaintiff to pursue his claims in this Court.

IV. The Court, in Its Discretion, Should Notify Technical Writers of their Potential Claims to Advance the Remedial Purposes of the FLSA

District courts "have the discretionary power to authorize the sending of notice to potential class members in a collective action brought pursuant to § 216(b) of the FLSA." Hoffmann v. Sbarro Inc., 982 F. Supp. 249, 261 (citing Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989)). Should the Court grant Epic's motion to compel individual arbitration, Plaintiff urges this Court to exercise its discretion to issue notice to Epic's TWs of their potential claims, so as to support the remedial purpose of the FLSA. Without court-supervised notice, Plaintiff and opt-in plaintiffs have no effective way to provide notice to the other TWs informing them that they may have a claim for unpaid overtime wages under the FLSA. Given that Epic has in the past sent misleading emails to its employees, misstating the nature of FLSA claims, without notice TWs are unlikely to be aware of their putative claims. (*See, e.g.,* Arbitration Email.) Without notice, Epic will have succeeded in keeping its other employees in the dark about their rights.

Issuing notice now will advance the interests of potential opt-in plaintiffs. In FLSA cases, other employees do not receive the benefit of automatic tolling when a complaint is filed; instead, each employee's limitations period continues to run unless and until she opts in. 29 U.S.C. § 256. With each passing day, therefore, every potential class member suffers harm in the form of newly time-barred claims. The most effective way to ensure that TWs are fully informed of their rights so that they can act on a timely basis is through court-supervised notice. If other TWs opt in, and they are determined to have enforceable arbitration contracts, then they can pursue their claims in arbitration. But without notice of their rights, the TWs will not have the opportunity to vindicate their rights in *any* forum. Thus, the Court should order notice so that TWs will be fully and accurately informed of their rights.

CONCLUSION

Epic's mandate that its employees must individually arbitrate their unpaid wage claims tips the scales impermissibly and completely in Epic's favor. The contract is restricted to claims employees would bring against Epic, allows Epic to unilaterally escape its terms, and deprives employees of their right to act collectively. These flaws cannot be papered over by the FAA. No valid contract to arbitrate exists in this case. For the foregoing reasons, Plaintiff respectfully requests that this Court deny Epic's motion to dismiss his class and collective claims and compel individual arbitration.

Dated this 10th day of July, 2015.

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